

STATE OF MICHIGAN  
COURT OF APPEALS

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MIDLAND COGENERATION VENTURE,

Petitioner-Appellee/Cross-  
Appellant,

v

CITY OF MIDLAND,

Respondent-Appellant/Cross-  
Appellee.

UNPUBLISHED  
February 21, 2006

No. 254636; 254745; 255066  
Michigan Tax Tribunal  
LC No. 00-242614

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Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

The City of Midland (respondent) appeals as of right from a judgment of the Michigan Tax Tribunal (Tribunal) involving the true cash value (TCV) of an electricity generating plant (MCV facility) owned by Michigan Cogeneration Venture (petitioner) for tax years 1997 and 1998. Respondent also raises issues on appeal with regard to the assessed and taxable values for the MCV facility for tax years 1997 through 2000. Petitioner cross-appeals, raising issues regarding the Tribunal’s true cash values for the years in question, as well as with the average level of assessment for those years. We remand for the limited purpose of clarification of whether the Tribunal erroneously included tax-exempt pollution-control equipment or property located outside the City of Midland in its concluded TCV. We affirm the Tribunal in all other respects.

Respondent’s first claim on appeal is that the Tribunal committed an error of law when it refused to consider the value of the MCV facility’s status as a qualified facility (QF) by the Federal Energy Regulatory Commission (FERC) under the Public Utilities Regulation Policies Act of 1978 (PURPA), 16 USC 2601, *et seq.*, in determining the TCV of the real and tangible personal property for ad valorem tax purposes. We disagree.

In the absence of fraud, this Court’s review of a decision of the Tax Tribunal is limited to whether the tribunal erred in applying the law or adopted a wrong legal principle. *Danse Corp v City of Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002). The tribunal’s factual findings are conclusive “if supported by competent, material, and substantial evidence on the whole record.” *Id.* (citation and internal quotation marks omitted). Substantial evidence “is that which a reasonable mind would accept as adequate to support a decision,” and may be less than a preponderance of the evidence. *McBride v Pontiac School Dist (On Remand)*, 218 Mich App

113, 123; 553 NW2d 646 (1996). “Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn.” *Id.*

The Michigan Constitution requires that property taxation be predicated on the true cash value of the real and tangible personal property.<sup>1</sup> *Wayne Co v Michigan State Tax Comm*, 261 Mich App 174, 178; 682 NW2d 100 (2004). MCL 211.27(1) provides, in pertinent part, that “‘true cash value’ means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale.” “The concepts of ‘true cash value’ and ‘fair market value’ in this state are synonymous.” *CAF Investment Co v State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974), *aff’d* 410 Mich 428 (1981).

It is well established in Michigan jurisprudence that intangibles are not generally taxable in and of themselves, but may be considered in the valuation of property where they affect its market value. See *Michigan Bell Telephone Co v Dep’t of Treasury*, 445 Mich 470, 485-486, 489; 518 NW2d 808 (1994); *Meadowlanes Ltd Dividend Housing Ass’n v Holland*, 437 Mich 473, 495-496; 473 NW2d 636 (1991); *Antisdale v City of Galesburg*, 420 Mich 265, 285; 362 NW2d 632 (1985). “In assessing the true cash value of a parcel of property, an assessor is to consider the existing use of the land, the income generated by any structures on the land and income generated by any other income-producing use.” *Southfield Western, Inc v City of Southfield*, 146 Mich App 585, 589; 382 NW2d 187 (1985), citing MCL 211.27(1).

In this case, respondent argued to the Tribunal that the MCV facility’s QF status and its attendant power purchase agreement (PPA) are intangibles that influence the value of the subject property and must be accounted for in determining the facility’s TCV. In rejecting respondent’s argument with regard to the influence of the PPA on the facility’s value, the Tribunal found that the PPA is clearly severable from the real and tangible personal property, but that it is owner-specific and only available to a QF. The Tribunal specifically found that the MCV facility’s QF status is not a purchasable commodity because the designation is dependent upon the owner and the rest of the qualifications set up by FERC under PURPA. Further, even if a new purchaser were to meet the qualifications to obtain QF status, the Tribunal found that a new purchaser of

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<sup>1</sup> Const 1963, art 9, § 3, states:

The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments.

the facility would have to negotiate with Consumers to continue the PPA. Because Consumers does not receive a pass through to the ratepayers in the amount of the PPA, however, the Tribunal found that the PPA is not in Consumers' best interest. The Tribunal, therefore, found that it is highly unlikely that Consumers would renegotiate a contract based on above-market capacity and energy payments. Thus, the Tribunal found that the QF status and the value of the PPA are parts of the value of the business itself, but they do not affect the market value of the real and tangible personal property for ad valorem tax purposes. As these are factual findings by the Tribunal, they are not reviewable by this Court. *Danse Corp, supra* at 178.

The Tribunal is under a duty to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property. *Great Lakes Division of National Steel Corp v City of Ecorse*, 227 Mich App 379, 389; 576 NW2d 667 (1998). The Tribunal is not bound to accept either of the parties' theories of valuation, *Teledyne Continental Motors v Muskegon Twp*, 145 Mich App 749, 754; 377 NW2d 908 (1985); rather, the Tribunal may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination, see *Meadowlanes, supra* at 485-486. Here, The Tribunal found that the subject property is a special-purpose property that is not conducive to an income approach, such as an apartment, multi-office complex, or shopping center, because the business itself produces income, not the property. Moreover, the Tribunal found that the respondent's income approach is an unreliable method for determining the value of the subject property because of the volatility of the energy market. The Tribunal determined that the replacement cost approach is the most reliable method of determining true cash value because it is based on the value of the real and tangible personal property and not the value of the owner-specific PPA. As it is apparent from the record that the Tribunal applied its expertise to arrive at an appropriate method of determining TCV, it did not commit an error of law or adopt a wrong legal principle; reversal is, therefore, not warranted. *Danse Corp, supra* at 178.

In any event, respondent failed to prove the effect of any intangible value influencers on the TCV of the facility. The Tribunal stated:

Neither party presented evidence that allows the Tribunal to make a determination of what, if any, market value the contract(s) add as an intangible value influencer. Respondent included the value of the entire business of MCV's partnership. The value of the real and tangible personal property is the value sought in this as valorem tax appeal: the true cash value of the subject property as of December 31, 1996[,] and December 31, 1997, not the true cash value of the contracts that MCV may hold. Respondent failed to determine how the intangible contracts add to or detract from the value of the subject property. . . . The Tribunal finds that the true cash value of the subject property may be influenced by the presence of the contracts in place; that influence has not been proved in this case.

As the Tribunal's determination that the influence of the QF status and the PPA on the value of the subject property has not been proved in this case is a factual conclusion, it is not reviewable because it is supported by competent, material, and substantial evidence on the whole record. *Danse Corp, supra* at 178.

Additionally, we are not persuaded by respondent's citation of out-of-state and unpublished cases. Although such authority often guides Michigan courts, it is only persuasive and not binding on this Court. *Barrett v Kirtland Community College*, 245 Mich App 306, 314; 628 NW2d 63 (2001).

Respondent's next claim on appeal is that the Tribunal should have dismissed petitioner's petition because it offered no evidence of TCV that includes the MCV facility's QF status. Given our holding that the Tribunal did not err in refusing to consider the facility's QF status or attendant contracts in determining TCV, this issue is moot.

Respondent next argues that, on remand, the Tribunal should consider the value representations that petitioner made to other agencies, such as the IRS and SEC, in other proceedings not before the Tribunal. We disagree. Whether evidence should be admitted at any trial on remand is a question left to the discretion of the trial court, or in this case, the Tribunal, following a proper offer of proof establishing the relevance and probative value of the evidence, if any. *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 95; 697 NW2d 558 (2005), citing MRE 401 and 403.

Respondent mischaracterizes the Tribunal's opinion in its brief when it states, "Incredibly, and without any citation to authority, the Tribunal declared this evidence [of petitioner's value representations in other proceedings and transactions] to be utterly irrelevant." The Tribunal cited MCL 205.735(1), stating,

"A proceeding before the Tribunal is original and independent and is considered de novo." The Tribunal is not the proper forum for Respondent to argue that Petitioner has to make the same arguments with respect to the market value of the subject property as it may have proffered to another agency under another principle. . . . Petitioner's position in prior years is not relevant to this proceeding. . . . Based on MCL 205.735(1), the Tribunal finds that Respondent's argument that MCV cannot put forth a different argument for the instant case is not relevant to these proceedings, the purpose of which is the determination of the true cash value of subject property for the years in contention.

In addition, Respondent's contention that Petitioner has misrepresented information to FERC, MPSC, SEC, and IRS is wholly unsupported. Respondent has produced no evidence to demonstrate these alleged misrepresentations. The Michigan Tax Tribunal is concerned solely with the determination of the true cash value of the real and personal property. The four above-mentioned entities look for information and have a role separate from that of the Tribunal. Given the adoption of the Sarbanes-Oxley Act in 2002, these matters are better left for a federal court and not the Tribunal. Furthermore, as discussed previously in this opinion, the role of FERC and the MPSC is significantly different than that of the Tribunal and, as such, they are not looking for the same information. Therefore, the Tribunal finds that these allegations have no merit.

Thus, even if evidence of petitioner's value representations to other agencies were relevant, respondent failed to support its argument with documentary evidence.

Respondent's reliance on *Meadowlanes, supra*, and *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348; 483 NW2d 416 (1992), for the proposition that the Tribunal erred in failing to consider petitioner's prior federal income tax returns is misplaced. Our Supreme Court in *Meadowlanes, supra* at 493, held that a petitioner's valuation approach was flawed for its failure to "parallel a likely valuation estimate derived for other purposes, i.e., a sales price, financing, insurance, calculating net worth in a financial statement, or federal income tax purposes." The valuation estimate in *Meadowlanes*, however, involved an actual sale of the subject property for market value during the year following the tax years at issue. In the present case, respondent offered a valuation from a federal income tax return that related to the 1990 sale/leaseback transaction between petitioner and the Owner Trusts. The Tribunal found as a matter of fact that this sale/leaseback transaction was not an arm's length transaction and was not a sale, but rather a long-term financing transaction. As a result, the Tribunal found that the sale/leaseback price was not a reliable indicator of the fair market value of the facility and refused to admit the 1990 income tax return as evidence. The Tribunal's factual finding is supported by substantial evidence and, therefore, is not subject to review. *Danse Corp, supra* at 178.

In *Jones & Laughlin Steel Corp, supra* at 354, this Court held that it was error for the Tribunal to cursorily reject evidence of a sale of the subject property, even if it was after the tax date. In the present case, it is clear that the Tribunal did not reject the evidence of petitioner's federal income tax returns "out of hand," as was the case in *Jones & Laughlin Steel Corp*. The parties were allowed to argue the admissibility of the tax return documents for five trial transcript pages before the Tribunal refused to admit them, and the Tribunal specifically stated in its opinion and judgment that the tax returns merely reflected the price of the 1990 sale/leaseback financing transaction, which bore no relation to the actual fair market value of the relevant tax dates over six years later. The tribunal did not abuse its discretion in refusing to admit respondent's proffered evidence, *Hashem, supra* at 95, and is not required to consider it on remand.

Next, respondent argues that the Tribunal's finding that respondent failed to prove the effect of the QF status as an intangible value influencer is wrong both as a matter of law, because it misapplies the burden of proof, and because it is not supported by substantial evidence. We disagree. As we discussed above, the Tribunal did not err in finding that the MCV facility's QF status is owner-specific and not properly considered when determining the true cash value of the real and tangible personal property. Thus, whether respondent proved the extent to which the QF status affected the true cash value is irrelevant and unnecessary to the Tribunal's decision. Statements that are unnecessary to the Tribunal's decision are dicta and do not warrant reversal, even assuming the Tribunal was incorrect. *Approximately Forty Acres v Penske*, 223 Mich App, 454, 463; 566 NW2d 652 (1997). Moreover, as we previously discussed, the Tribunal did not err in applying the burden of proof. Petitioner cannot be held to the burden of coming forward with evidence to prove irrelevant facts.

Respondent next argues that the Tribunal erred in failing to account for millions of dollars in personal property after it had acknowledged its existence. We disagree.

The record shows that both respondent's appraisal, by George Sansoucy and Glenn Walker (S/W), and petitioner's appraisal, by John C. Goodman, included the value of the tangible personal property in their conclusions of true cash value. The Tribunal relied on each of

these appraisals when arriving at its independent value conclusions in its January 23, 2004, Opinion and Judgment. Included in this personal property was the value of a \$13.8 million Monoblock rotor that was used to repair the steam turbines that were part of the \$112,692,200 of personal property that respondent's assessor, Diane Dryzga originally allocated in her assessment. The Tribunal found:

[T]he \$13,800,000 for the Monoblock rotor repair is already included as an addition in the real property, as it added an additional 6MW of capacity. The value of the additional capacity is captured in the COR [cost of replacement]. . . . The original cost of the rotor could not be segregated to include any additional value for the repair of the personal property. Doing so would double add the costs to both the real and personal property.

The Tribunal, therefore, found that it erred when it added the value of the personal property to appraisals that already included this value. The Tribunal recognized and corrected this error in its July 16, 2004, order when it stated, "In the Tribunal Opinion and Judgment, the value for the traditional personal property was double counted in the final value, and values were incorrectly allocated." The Tribunal then adjusted its value conclusions accordingly. Respondent's argument that the personal property component was not included in the buildings and fixtures component appears to be based on its belief that the true cash value of buildings and fixtures was greater than that determined by the Tribunal; however, as previously discussed, the Tribunal's determination is supported by substantial evidence and must not be disturbed. *Danse Corp, supra* at 178.

Respondent next argues that the Tribunal committed an error of law in its application of the rules governing the service of subpoenas on witnesses when it ruled to limit the testimony of petitioner's Chief of Maintenance, Robert McCue. We decline to address the merits of this issue because respondent has failed to allege or demonstrate any prejudice caused by the Tribunal's ruling. *Georgetown Place Co-op v City of Taylor*, 226 Mich App 33, 51; 572 NW2d 232 (1997). Although respondent claims that the Tribunal erroneously limited McCue's testimony to getting certain documents into the record, the Tribunal later allowed McCue to testify for three days regarding the facility's operations, just as respondent originally requested. Reversal is, therefore, not warranted on this issue.

Lastly, respondent argues that the Tribunal was without jurisdiction to enter its orders after respondent filed its claim of appeal with this Court. This Court, however, granted petitioner's motion to remand to the Tribunal precisely to cure any jurisdictional defects with regard to the March 31, 2004, and April 15, 2004, orders. *Michigan Cogeneration Venture v City of Midland*, unpublished order of the Court of Appeals, entered June 22, 2004 (Docket Nos. 254636; 254745; 255066). Pursuant to this Court's remand, the Tribunal then entered its final order on July 16, 2004, which corrected any mathematical or allocation errors from its original Opinion and Judgment or from the subsequent errata, superceding them, and rendering respondent's issue moot and entirely without merit.

On cross-appeal, petitioner first argues that the Tribunal committed an error of law by substituting substantially higher dollar amount for its previously concluded true cash values for tax years 1997 and 1998. We disagree. We agree, however, with respondent's characterization of the Tribunal's Opinion and Judgment that the rounded true cash values of \$600,000,000 for

1997 and \$621,960,000 for 1998 do not constitute conclusions of true cash value by the Tribunal. Rather, based on the various appraisals that were admitted into evidence, the Tribunal gave several different adjusted and unadjusted calculations of true cash value throughout its opinion. We agree with respondent's assessment that the Tribunal's opinion is poorly written, but when read as a whole, we find that the Tribunal only set forth its own, independent TCV conclusions on pages 184 and 185 of its Opinion and Judgment, where it states, "The Tribunal finds from its examination of evidence received at the hearing in this matter that the true cash values for the subject property are as follows . . . ."

We, therefore, find no merit to petitioner's argument that the Tribunal arrived at its own, independent true cash values for tax years 1997 and 1998, but then substituted substantially higher figures for those years. A fair reading of the Opinion and Judgment reveals that the Tribunal arrived at only one set of true cash value conclusions that incorporated the Goodman and S/W appraisals and the Dryzga assessment, which was found on pages 184 and 185. The Tribunals' four subsequent errata further support this reading of the Opinion and Judgment, as all were based on the final value conclusions as opposed to the various appraisals and calculations set forth earlier in the opinion.

Petitioner next argues that the Tribunal based its final TCV conclusions on Goodman's replacement cost approach, but committed an error of law or adopted a wrong principle in failing to deduct the value of tax-exempt, pollution-control property, as Goodman did. The petitioner in *Great Lakes, supra*, raised the identical issue, but this Court treated the claim, "as merely presenting an issue concerning how much of the overall true cash value . . . should be allocated to pollution abatement equipment." *Id.* at 417. "Stated otherwise, the first determination must be how much fair market value should be allocated to pollution abatement equipment. Once that allocation is made, the next step would be to determine if the allocated amount is exempt and therefore not subject to the General Property Tax Act." *Id.* This Court held that the Tribunal's allocation method was based on a wrong principle because it had made no allocation for the true cash value of the exempt pollution abatement equipment. *Id.* at 417-418.

Upon review of the Tribunal's Opinion and Judgment, we find that it is impossible to determine what amount, if any, of the Tribunal's adjusted cost of replacement reflects the value of the pollution-control equipment. No statements in the Opinion and Judgment indicate whether the Tribunal deducted the value of the pollution-control equipment, or otherwise adjusted Goodman's appraisal with regard to this equipment, prior to arriving at its own valuation. Further, because Goodman's appraisal was only one of the valuations the Tribunal considered in arriving at its own, independent true cash value conclusion, it is impossible to determine how much Goodman's appraisal affected the Tribunal's final valuation. As pollution-control equipment is exempted from property taxation by statute, MCL 324.3704 and 324.5904, its inclusion by the Tribunal would be an error of law requiring reversal. Moreover, pursuant to this Court's holding in *Great Lakes, supra* at 417-418, the Tribunal's failure to make an allocation for the true cash value of the exempt pollution abatement equipment constituted the adoption of a wrong principle. We, therefore, remand to the Tribunal for allocation of the value of the pollution-control equipment and clarification of whether it was included in the Tribunal's final valuation.

Petitioner also argues that the Tribunal based its final value conclusions on the S/W cost approach, but erred in failing to deduct the value of property located outside Midland, which was

not subject to assessment by respondent. This property allegedly includes a 26-mile pipeline, with an original cost of over \$21 million. Petitioner claims that this property has been appraised by other taxing units for almost \$11 million for 1997 and almost \$10 million for 1998, and assessed at half those amounts.

As was the case for the pollution-control equipment, we find that it is impossible to determine what amount, if any, of the Tribunal's adjusted cost of replacement reflects the value of property located outside Midland. Further, because the S/W appraisal was only one of the valuations the Tribunal considered in arriving at its own, independent true cash value conclusion, it is impossible to determine how much the S/W appraisal affected the Tribunal's final valuation. Because the rule of uniformity prohibits double taxation, 1963 Const, art 9, § 3; see also *Shapero v State Dep't of Revenue*, 322 Mich 124, 141; 33 NW2d 729 (1948), and respondent has cited no authority permitting it to assess property located outside the City of Midland, inclusion of such property by the Tribunal would be an error of law or adoption of a wrong principle. We, therefore, remand to the Tribunal for clarification of whether the value of the pipeline and other property outside the City of Midland was included in the Tribunal's final valuation.

Petitioner next argues that the Tribunal committed an error of law by double counting the value of the land on which the MCV facility lies for tax years 1997 and 1998. We disagree.

Although Petitioner correctly points out that the Goodman cost approach already included \$10 million for the value of the land, the S/W appraisal first determined the replacement cost of the MCV facility separately from the value of the land, and then added it to the total afterward. The S/W cost approach initially determined that the replacement cost of the MCV facility was approximately \$1.12 billion for tax year 1997, but then added \$45 million in spare parts and \$10 million in land for a total true cash value of approximately \$1.17 billion. The Goodman cost approach, on the other hand, resulted in a true cash value of only \$277 million for tax year 1997. While the Tribunal stated that its final, independent value conclusions were based on its own adjustments to the Goodman and S/W cost approaches, as well as Dryzga's assessment, it clearly adjusted those appraisals a great deal to arrive at its final conclusion of true cash value of \$710 million for tax year 1997. There is simply nothing in the record to support petitioner's argument that the Tribunal relied on a cost approach that already included the value of the land before making its adjustments and arriving at its independent value conclusions.

There is, however, language in the opinion to suggest that, even if the Tribunal started with appraisals that included the value of the land, its adjustments took this value into account, and it calculated the true cash value accordingly. In contrast to the complete absence of any accounting for the value of pollution-control equipment or the pipeline located outside Midland, the Tribunal's original opinion and subsequent errata all specifically address the value of the land separately from the value of the "subject buildings (on leased land), improvements, electrical generating equipment, together with instruments, control systems and related equipment." Because the Tribunal's independent value conclusions bear very little relation to the true cash values given by the Goodman and S/W appraisals, petitioner has not demonstrated that the Tribunal "double-counted" the value of the real property in its opinion or subsequent errata. On the contrary, the record shows that the Tribunal separately accounted for the value of the real property and the tangible personal property that make up the MCV facility. As the Tribunal's conclusion is supported by substantial evidence, it is not reviewable. *Danse Corp, supra* at 178. Remand is, therefore, not required with regard to this issue.

Petitioner next argues that the Tribunal's use of an admittedly excessive replacement cost in the S/W cost approach valuation is unsupported by substantial evidence in the record. We disagree. The tribunal determined that the S/W cost estimate of \$765 per KW of capacity did not accurately reflect the cost of the subject facility, and had to be adjusted for time, location, and physical differences. Likewise, the tribunal did not accept the S/W amended cost of \$729 per KW, finding that, too, was excessive. The Tribunal then applied a formula to account for differences in construction costs between the comparable cogeneration facility in Sithe, New York, and the MCV facility. The tribunal determined that the original S/W cost estimate of \$765 per KW should be reduced by \$284, for a \$481 per KW cost of replacement.

Although petitioner argues that the Tribunal should have used S/W's amended cost estimate of \$729 per KW before applying the formula and reduction, there is no requirement that the Tribunal had to accept this amended estimate. *Meadowlanes, supra* at 485-486. The Tribunal stated that the amended S/W cost estimate of \$729 per KW was excessive; clearly, it was grossly in excess of the Tribunal's adjusted estimate of \$481 per KW. The Tribunal's use of the original S/W cost estimate of \$765 per KW as its starting point before adjusting for differences in time, location, and construction costs is supported by competent, material, and substantial evidence in the record. Review of this issue is, therefore, precluded. *Danse Corp, supra* at 178.

Next, petitioner argues that Goodman's cost approach had already taken the MCV facility's increase in capacity to 1422 MW into account for tax year 1997, and the Tribunal, therefore, erred when it increased the true cash value for 1998 to reflect these upgrades. The Tribunal stated that Goodman included the increase in capacity, but he did not include the expenditures for the upgrades. Rather, in 1997 the capital cost was a deduction to the cash flow of approximately \$50 million. Given that Goodman concluded that the true cash value of the MCV facility was \$277 million for 1997 and \$444 million for 1998, the \$50 million deduction to the facility's 1997 cash flow negated the fact that Goodman accounted for the increased capacity in 1997. The Tribunal found that difference between the two years is due to 1) the discount rate, 2) changes in wholesale prices of natural gas, electric capacity, and energy, 3) *the gas turbine upgrades*, and 4) depreciation for physical, functional, and external changes. Thus, the record demonstrates that, although Goodman accounted for the increased capacity in 1997, the resultant increase in true cash value was not reflected in his appraisal until 1998. The Tribunal, therefore, found, "The 1997 true cash value increased due to the addition of the upgrades and the difference in capacity. . . . The additional capacity is treated as a new 'addition' for taxable value purposes. The 1998 taxable value is NOT capped by the 1.028 CPI inflation factor due to the 'addition.'" This finding is supported by substantial evidence on the whole record and, therefore, is not subject to review. *Danse Corp, supra* at 178.

With regard to petitioner's claim that the Tribunal failed to account for 9.7 percent depreciation for the 1997 tax year and 11.7 percent depreciation for the 1998 tax year, there is no evidence on the record to either support or refute this claim. It is unclear from the Tribunal's concluded true cash values for 1997 and 1998 how much, if any, value was allocated to account for depreciation. The Tribunal stated that it adjusted for a CPI inflation factor between 1997 and 1998, which was not capped at 1.028 because of the increase in capacity. Thus, the increase in true cash value between 1997 and 1998 does not necessarily support petitioner's claim that the Tribunal did not account for greater depreciation. If petitioner had been concerned about

whether the Tribunal properly accounted for the increased depreciation in its original opinion, petitioner had ample opportunity to raise this issue before the Tribunal, as it issued several errata, or to motion this Court to remand. Because petitioner did not raise the amount of depreciation as an issue before the Tribunal, this issue is not properly preserved for this Court's review. *Town & Country Dodge, Inc v Dep't of Treasury*, 420 Mich 226, 228 n 1; 362 NW2d 618 (1984). This Court need not address issues raised for the first time on appeal. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). We, therefore, decline to review this issue.

Lastly, petitioner argues that the record establishes that the average levels of assessment for the City of Midland were 49.783 percent for 1997 and 49.682 percent for 1998, and that the Tribunal's use of 50 percent as the average level of assessment is unsupported by substantial evidence. We disagree.

We first note that petitioner mischaracterizes respondent's argument and misquotes the Tribunal's opinion when it states in its brief, "There is no dispute that the 'actual level of assessment was 49.7% for the 1997 tax year,'" and "the actual level of assessment established was 49.7%." Rather, the Tribunal stated, "the actual level of assessment *estimated* was 49.7%" (emphasis added). Moreover, this was not a "finding" by the Tribunal. This section of the opinion was merely a summary of the witnesses' testimony: specifically, that of respondent's witness Kent Kellar,<sup>2</sup> who was the equalization director for Midland County until December 31, 2001. The Tribunal's findings of fact and conclusions of law did not begin until page 113 of the opinion. Further, in its brief, respondent expressly disputes petitioner's assertion that the average level of assessment was 49.7 percent for 1997.

A taxpayer may only obtain relief if the taxpayer can show that the subject property was "assessed at a different proportion of true cash value than the rest of the property *within the same class* in the taxing district." *Great Lakes, supra* at 427, citing *Shaughnesy v Tax Tribunal*, 420 Mich 246, 249-250; 362 NW2d 219 (1984) (emphasis added). Here, petitioner makes no distinction whatsoever between the classes of property that make up the MCV facility, which was over 98 percent utility personal property and less two percent industrial real property,<sup>3</sup> and the rest of the property assessed by respondent. Rather, petitioner added up the assessed values of all the property of every class within respondent's tax district, subtracted the assessed value of the MCV facility, then divided that number by the total true cash value of all the property within the taxing district, minus the true cash value of the MCV facility. Following these calculations, petitioner arrived at 49.738 percent and 49.682 percent as the entire assessing district's average levels of assessment, not including the MCV facility, for tax years 1997 and 1998, respectively.

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<sup>2</sup> According to Kellar's testimony, the 49.7 percent estimated level of assessment was based on a two-year study of sales of primarily commercial real property, as well as some industrial real property, and personal property. Significantly, the estimate included no utility property, which makes up over 98 percent of the value of the MCV facility.

<sup>3</sup> The MCV facility constituted all of the utility personal property within the taxing district, but only 1.19 percent of the industrial real property.

No witness, however, testified that these were the average levels of assessment for any class of property.

Moreover, petition has not demonstrated that it is entitled exclude the subject property when determining the average level of assessment for the applicable classes of property within the assessing district for the tax years at issue. Petitioner cites *Great Lakes, supra* at 426-427, for the proposition that “where as here, the assessment of a subject property constitutes a significant part of the total assessed value in the assessment district, then the average level must be determined without consideration of the subject property.” Although this is a correct statement of law, the subject property must still constitute a significant part of the total assessed value *of a particular class of property* because, as this Court stated, “[T]he average level of assessment serves a distinct purpose from county or state equalization by addressing unequal assessment levels *within a class of property* in a single taxing district.” *Great Lakes, supra* at 427 (emphasis added). Here, the assessed value of the industrial real property for 1997 was \$2,507,900 while the total assessed value of industrial real property in the City of Midland for that year was \$211,050,200. As petitioner’s industrial real property made up only 1.19 percent of the total property of that class, “[t]he subject property need not be excluded when it is not a significant factor.” *Id.* at 428. With regard to petitioner’s utility personal property, the record indicates that the MCV facility contained the only property of this class within the assessment district for the tax years at issue. Thus, it is impossible to calculate the average level of assessment for utility personal property without including the MCV facility.

Petitioner, in its reply brief, cites *In re Appeal of Gen Motors Corp*, 376 Mich 373, 378-380; 137 NW2d 161 (1965), for the proposition that all property must be placed in one category and assessed uniformly. The Supreme Court in *Gen Motors*, however, was interpreting the 1908 Michigan Constitution and a previous version of MCL 211.24, which specifically instructed the assessing officer to estimate the true cash value of both real and personal property; whereas, the current version only refers to real property.<sup>4</sup> This Court has previously addressed the limited

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<sup>4</sup> The Court in *Gen Motors* quoted CLS 1961 § 211.24, which stated:

The supervisor shall estimate, according to his best information and judgment, the true cash value of every parcel of real property and set the same down opposite such parcel. He shall also estimate the true cash value of all the personal property of each person, and set the same down opposite the name of such person.

The relevant portion of the current version of MCL 211.24 states;

The assessor shall estimate, according to his or her best information and judgment, the true cash value and assessed value of every parcel of real property and set the assessed value down opposite the parcel.

The current version of MCL 211.24 does not contain any reference to personal property at all.

applicability of *Gen Motors* in *WPW Acquisition Co v City of Troy*, 250 Mich App 287, 309-310; 646 NW2d 487 (2002), when it stated,

As an initial matter, we note that in *General Motors*, *supra*, the Court did not rule that the language requiring that “property shall be uniformly assessed” as set forth in Const 1963, art 9, § 3 required that the plaintiff be granted relief similar to that sought by plaintiffs here. Indeed, this language did not even exist in the 1908 version of the state constitution, which merely called for a “uniform rule of taxation.” *General Motors*, *supra* at 377; 137 NW2d 161. Further, the key issue in *General Motors* was whether, in assessing personal property, the STC erred in adopting a standard of average assessment levels to determine the question of uniform treatment of the plaintiff, but did not take into account the average assessment for all property, *both real and personal*. *Id.* at 377, 380; 137 NW2d 161. Therefore, contrary to plaintiffs’ assertions on appeal, *General Motors* does not stand for the narrow proposition that the ratio of taxable value to true cash value need be equal to the average ratio for all property in a township or city. [Emphasis in original, footnote omitted.]

Finally, petitioner cites *Steelcase, Inc v City of Kentwood*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2005 (Docket No. 256174).<sup>5</sup> This case is not binding on this Court because of its unpublished status. MCR 7.215(C)(1). Even if *Steelcase* were binding, however, it is clearly distinguishable from the present case. In *Steelcase*, a city assessor testified that the average level of assessment was in fact 49.61 percent, but she rounded this ratio up to 50 percent on the basis of the Assessor’s Training Manual. In contrast, the assessor in the present case never testified regarding the average level of assessment for each of the subject classes of property, and respondent disputes petitioner’s assertion that the average level of assessment was ever established as below 50.0 percent

Thus, we hold that the Tribunal did not commit an error of law or adopt a wrong principle in determining the average level of assessment according to property class, and there is substantial evidence in the record to support its findings. Therefore, we do not disturb those findings. *Danse Corp, supra* at 178.

We remand this case to the Tax Tribunal for the limited purpose of clarifying the record to show whether it included the value of the tax-exempt, pollution-control equipment or of the property located outside the City of Midland in its final true cash value conclusions. The Tribunal shall allocate dollar values for this property on the record. If the Tribunal did include this value in its TCV conclusions, then the value must be deducted from the true cash values set forth in the Tribunal final’s order, dated July 16, 2004, and the other values in the chart must be adjusted accordingly. We affirm the Tribunal in all other respects.

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<sup>5</sup> This panel granted petitioner’s motion to file this case as supplemental authority in *Michigan Cogeneration Venture v City of Midland*, unpublished order of the Court of Appeals, entered December 21, 2005 (Docket Nos. 254636; 254745; 255066).

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski

/s/ Michael J. Talbot